



BOARD OF INQUIRY *(Human Rights Code)*

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint of Maria Cugliari dated May 27, 1998 alleging sexual solicitation/advance, reprisal and threat of reprisal for rejection of sexual solicitation/advance, sexual harassment and discrimination in employment on the basis of sex.

B E T W E E N:

Ontario Human Rights Commission

-and-

Maria Cugliari

Complainant

-and-

Telefficiency Corporation, Bill Clubine and Michael Brunet

Respondents

INTERIM DECISION

Adjudicator: Steven Faughnan

Date: September 12, 2001

Board File No.: BI-0388-01

Decision No.: 01-021-I

APPEARANCES

Ontario Human Rights Commission)	
)	Prabhu Rajan, Counsel
)	

Maria Cugliari, Complainant)	
)	Mark Hart, Counsel
)	

No one appearing for the Respondents Teleefficiency Corporation or Bill Clubine

No one appearing for Michael Brunet

INTRODUCTION

These are my reasons for decision on a motion brought by the Complainant, Maria Cugliari (“Cugliari”), to add Michael Brunet (“Brunet”) as a Respondent to Cugliari’s Complaint dated May 27, 1998 (the “Complaint”). In addition, Cugliari seeks an order requiring the Respondents to serve and file their pleadings and to make disclosure to Cugliari and the Ontario Human Rights Commission (the “Commission”) of all information and evidence upon which they intend to rely to support their case, failing which certain sanctions would apply.

Neither Brunet, Teleefficiency Corporation (“Teleefficiency”) nor Bill Clubine (“Clubine”) attended at the motion to oppose the relief requested nor were any responding materials filed. At the time of the hearing on June 26, 2001, only the Commission and the Complainant had served and filed pleadings. At the hearing it was determined that Teleefficiency, Clubine and Brunet were properly served with the notice of motion and an oral ruling was given adding Brunet as Personal Respondent in accordance with subsection 39(3) of the *Human Rights Code*, R.S.O 1990 c. H.19, as amended (the “Code”) with reasons to follow in the final decision. The balance of the motion was taken under reserve. As a result of correspondence dated August 30, 2001 from Brunet inquiring why and how he was added as a Personal Respondent, the Board determined that reasons for the decision should be provided now.

THE ISSUES

There are three issues to be addressed on the motion:

1. Was the motion record properly served?
2. Should the Board of Inquiry (the “Board”) add Brunet as a party?
3. What sanctions should apply for the failure of the Respondents to file pleadings and make disclosure?

THE DECISION

The Board found that Telefficiency, Clubine and Brunet were properly served with the notice of motion and that Brunet is a proper party to the Complaint. In a letter dated July 27, 2001, the Board confirmed the oral ruling that added Brunet as a Personal Respondent. The letter also set out the dates that I determined for the service and filing of particulars by the Commission and the Complainant, the date that the Respondents were to provide a response and the date the Commission and the Complainants were to provide a reply, if any. The letter also fixed a date for the disclosure of the information and evidence on which the Respondents will rely on in support of their case. The letter stated that failure to do so may result in the Board's refusal to allow the Respondents to refer to or enter the document or physical evidence into evidence at the hearing. In this connection the Respondents were directed to consider the Board's powers as set out in Rule 43 of the Board's Rules of Practice.

BACKGROUND

This hearing relates to the complaint of Maria Cugliari, a former probationary employee of Telefficiency. As set out in the pleadings filed by the Complainant prior to the motion, Brunet is alleged to be the President and Chief Executive Officer of Telefficiency and Clubine the Chief Financial Officer. As set out in the Complaint Cugliari alleges that she was discriminated against on the basis of her sex and suffered sexual solicitation and harassment, and that the day after an incident where she refused the sexual advances of Clubine, she was terminated. The Complaint alleges that the termination of her employment at Telefficiency constitutes a reprisal for Cugliari's rejection of the sexual advances made by Clubine contrary to section 7(3)(b) of the *Code*, or is related to Clubine's sexual interest in her and thereby constitutes discrimination on the basis of sex, contrary to section 5 (1) of the *Code*.

The matter was referred to the Board for a hearing. On the telephone conference call that commenced the hearing before the Board held on February 23, 2001 the Complainant, the Commission, Brunet acting on behalf of Teleefficiency, and Clubine agreed to a schedule for an exchange of pleadings and disclosure and that, subject to final confirmation, a mediation would be held on June 14, 2001. During the conference call, in accordance with their agreement, the Board determined that Teleefficiency and Clubine would deliver their pleadings and disclosure on May 15, 2001 and a Pre-Hearing Conference date was set for June 26, 2001, which was also reserved for the hearing of any motions to be brought by any party to the proceeding. On the conference call Clubine asked that all materials relating to him in the matter be served on him at the offices of Teleefficiency. At no time during the conference call did Brunet or Clubine object to the schedule of proceedings. The schedule of proceedings was confirmed by the Confirmation of Matters Determined at the First Day of Hearing sent by the Board to all parties on March 2, 2001.

Teleefficiency then sent correspondence to the Board on April 24, 2001, to advise of a change of Teleefficiency's address and new telephone and facsimile numbers. The letter also advised that Teleefficiency would attend but would not be represented by counsel at the mediation on June 14, 2001.

Neither Teleefficiency nor Clubine filed their pleadings or provided disclosure by the agreed dates. By letter dated May 28, 2001, Complainant's counsel requested a rescheduling of the mediation date as a result of a scheduling conflict. In his letter counsel indicated that because the deadline for the delivery of pleadings and disclosure had already been missed by Teleefficiency and Clubine, the rescheduling was conditional upon the Respondents delivering the disclosure and pleadings by no later than June 8, 2001.

By letter dated May 31, 2001, the Board advised the parties of the rescheduling request and directed Teleefficiency and Clubine to file their pleadings and response no later than June 8, 2001. No

pleadings were filed by that date.

On June 12, 2001 Brunet sent facsimile correspondence to the Board advising, amongst other things, that Teleefficiency was unable to file pleadings “due to extreme difficult economic times that Teleefficiency is facing”. The letter requests the Board’s advice with respect to remedies to “give us the time to get back on our feet so that we can properly prepare and defend ourselves” and concludes by stating that two months were needed to continue with the cutbacks and “turn this around”.

On June 19, 2001, the Complainant’s Motion was served on Teleefficiency, Clubine and Brunet by facsimile to the fax number set out in the letter from Teleefficiency dated April 24, 2001. After the service of the motion materials, no other letter, nor any affidavit material supporting any of the allegations set out in the June 12, 2001 letter or providing grounds in opposition to the motion, was received from Teleefficiency, Clubine or Brunet.

On the motion date of June 26, 2001, at the scheduled start time of 10:30 a.m. only the Complainant’s counsel and Commission counsel were in attendance. They wished to proceed. The Board waited until 11:00 a.m. to commence the motion. Prior to commencing the motion the Board directed that an effort be made to contact Brunet and Clubine by telephone.

When the motion commenced at 11:00 a.m. Commission counsel advised that he had telephoned Brunet at the telephone number provided for Teleefficiency and received Brunet’s voicemail which indicated that Brunet was in New York on the 25th and 26th of June (the date of the motion) and would return on June 27, 2001. Initially when he heard this, counsel advised the Board that he pressed zero and spoke to a receptionist who confirmed that Brunet was in New York. When Commission counsel asked the receptionist about Clubine, the receptionist advised that he was not in and was not expected in that day. Commission counsel advised the Board that he then left telephone messages for Brunet and Clubine on their voicemail advising that the complainant’s motion was

being heard that day, provided the general telephone number for the Board, and asked that they call the Board if they had an intention of attending, failing which it was presumed that they did not wish to attend. Neither Brunet nor Clubine called the Board that day regarding the motion.

The motion proceeded accordingly.

SERVICE OF THE NOTICE OF MOTION

Parties' Submissions

The Complainant submits that on June 19, 2001, the Complainant's Motion was properly served on Teleefficiency, Clubine and Brunet by sending the motion record by facsimile to the facsimile telephone number set out in the letter from Teleefficiency dated April 24, 2001, being the fax number at the last known address for Teleefficiency, Clubine and Brunet.

Analysis

In accordance with Rule 21 of the Board's Rules of Practice service of documents is deemed to be effective when delivered:

(b) by fax on the same day as the transmission;

At the person's last known address, unless the person to whom the notice is to be given establishes that he or she, acting in good faith and through absence, accident, illness or other causes beyond his/her control, failed to receive the notice or received it at a later date.

Based on the facts as set out above, the Board was satisfied that the motion materials were validly served on Teleefficiency, Clubine and Brunet. In the alternative, if necessary, based on the facts as set out above, in all the circumstances, the Board considered it appropriate to invoke Rule 14

of the Board's Rules of Practice to validate service of the motion materials on Clubine and Brunet.

Finally, even if the letter dated June 12, 2001 is to be treated as a request for an adjournment, the Board was not satisfied that the reasons given in the letter from Brunet dated June 12, 2001, entitled Teleefficiency, Clubine or Brunet to an adjournment or excused Mr. Brunet's failure to attend at the hearing on June 26, 2001. In the absence of an adjournment Brunet was obliged to attend the hearing or bear the consequences of his failure to attend.

ADDING BRUNET AS A RESPONDENT

Parties' Submissions

The submissions are summarized as follows.

The Complainant alleges that she was discriminated against on the basis of her sex and suffered sexual solicitation and harassment, and that the day after an incident where she refused the sexual advances of Clubine, she was terminated. The pleading filed by the Complainant prior to the motion alleges that Brunet and Clubine are the two principals of Teleefficiency. Brunet is alleged to be the President and Chief Executive Officer and Clubine the Chief Financial Officer.

The Complainant submits that the timing of the Complainant's termination, namely the day after the alleged incident of sexual harassment and solicitation, the fact that Clubine along with Brunet are the two principals of the corporation, and the absence of a credible non-discriminatory explanation for the termination, cast doubt on the position of Teleefficiency and Clubine that the Complainant was let go for non-discriminatory reasons, and that accordingly, Brunet directly or indirectly infringed the *Code*. The Complainant thereby challenges the propriety of the termination decision and of Brunet's role in the decision.

The Complainant submits that the decision to terminate in which Brunet participated met the definition of a reprisal under section 7(3)(b), being a reprisal for the rejection of a sexual solicitation or advance, or is related to Clubine's sexual interest in her and thereby constitutes discrimination on the basis of sex under section 5(1). The Complainant submits that by participating in the decision, even though Teleefficiency has been named as a Respondent, Brunet directly or indirectly infringed the *Code*, contrary to section 9. A remedy is now being sought against Brunet personally.

The Complainant further submitted there would be no prejudice to Brunet if he is added as a party as he has been on notice of the Complaint from the outset and has been acting as the representative for the Corporate Respondent throughout the proceedings before the Board. The Complainant submits that because she is now seeking a remedy against Brunet, that Brunet should be made a party now, so that he is fully aware of his potential liability and has the procedural rights and remedies of a full party from the outset.

In support of her request to add Brunet, the Complainant relied on the decision of the Board in *Tabar v. Scott* (1982), 3 C.H.R.R. D/1073; reversed on other grounds (sub nom. *West End Construction Ltd. v. Ontario (Ministry of Labour)* (1986), 9 C.H.R.R. D/4537 (Div. Ct.); reversed on other grounds (1989), 10 C.H.H.R. D/6491 (Ont.C.A), which while decided at a time when the wording of the then applicable section to add parties differed, confirmed that the Board has a broad discretion to add a respondent to a proceeding before it, and that prejudice to the respondent is an important factor in deciding to add a respondent.

The Complainant submits that if any person "appears" to the Board to have infringed a right, notably a right set out in section 5(1) of the *Code*, that person can be added under section 39(2)(d) of the *Code*, without the Board making a final factual determination in the matter.

The Complainant acknowledged that Brunet was not added as a respondent in the Complaint. The Complainant submitted that this was because at the time that the Complaint was drafted, the Complainant was not fully aware of the role that Brunet had in the termination.

The Complainant candidly admitted that the letter from Brunet dated June 12, 2001, which she submits raises financial concerns, was the catalyst for the motion to add Brunet. The Complainant submitted, however, that even if no financial concerns were raised it would still be proper to add Brunet as a Personal Respondent at this stage for the reasons set out above.

The Complainant submits that although it is not normal practice for all corporate office holders to be added at the outset, if the motion to add Brunet is refused this could result in a situation where, out of an abundance of caution, all corporate officers will be named in future complaints made by complainants that are of a similar nature.

The Commission supported the Complainant's motion to add Brunet as a Personal Respondent.

Analysis

In adding parties to a proceeding it is clear that the Board has wide discretion. If any person "appears" to the Board to have infringed a right, notably a right set out in section 5(1) of the *Code*, pursuant to ss. 39(2)(d) and 39(3) of the *Code*, the Board has jurisdiction to add that person as a respondent to a complaint.

The wording of the sections does not prohibit the adding of a personal respondent who is an officer of the corporation, when a corporation has also been named in the complaint.

In his capacity as President and Chief Executive Officer of Telefficiency, Brunet has been involved in the investigation of the complaint and the proceeding before the Board from the outset so there is no prejudice to adding him at this time.

The timing of the Complainant's termination, namely the day after the alleged incident of sexual harassment and solicitation, and the fact that Clubine along with Brunet are the two principals of the corporation, may cast doubt on the position of Telefficiency and Clubine that the Complainant was let go for non-discriminatory reasons.

If it is established at the hearing on the merits that the termination was tainted by a discriminatory factor, the Complainant and the Commission may be successful in obtaining a remedy against Brunet.

The motion to add Brunet was not opposed. Telefficiency, Brunet and Clubine did not file any materials after the motion was served contesting the grounds for adding Brunet, denying his involvement or challenging the allegation that the termination was discriminatory.

While making no final determination on the facts of this case or whether the sections of the *Code* alleged to have been breached were in fact breached, even though Telefficiency is named as a Respondent, considering that Brunet can be linked to the termination and a remedy is now being sought against him, and there being no responding materials filed or an attendance at the motion to contest Brunet being added as a party, the Board determined that it was appropriate to add Brunet as a Personal Respondent pursuant to section 39(3) of the *Code*. The Complaint was amended to add Brunet as a Respondent and the title of proceedings was amended accordingly.

By adding Brunet at this early stage, he has access to the full panoply of procedural rights accorded to a party.

It is not necessary to address the Complainant's other submissions.

However, in all the circumstances, in accordance with subsection 39(3) of the *Code*, the Complainant and the Commission were directed in the Board's letter of July 27, 2001 to serve and file particulars setting out the specific facts upon which they rely in support of the allegations against Brunet.

THE FAILURE TO FILE PLEADINGS AND PROVIDE DISCLOSURE

Parties' Submissions

The Complainant submits that the failure to comply with the Board's Rules of Practice should attract serious sanction.

The Complainant submits that the Board order that disclosure and pleadings be provided by a date set by the Board. The Complainant requests that if pleadings are not provided, that the Respondents be deemed to admit the truth of the allegations of fact set out in the pleadings of the Commission and the Complainant, a procedure analogous to that set out in the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as amended, for the Superior Court of Justice, which provide for an admission of facts set out in Statement of Claim as a result of the failure to file responding materials.

If disclosure is not provided by the set date, the Complainant asked that the Respondents be prohibited from leading any evidence at the hearing of the matter unless such evidence has been disclosed to the Complainant or Commission or pertains to a fact or event set out in any pleadings filed by the Respondents. This, it is submitted, is required to avoid surprise and to comply with the rules of natural justice, which provide that a party to a proceeding must know the case that has to be

met, and to prevent a tailoring of evidence at the hearing by the Respondents after the Complainant and Commission have led their case.

The Commission supported the Complainant's motion.

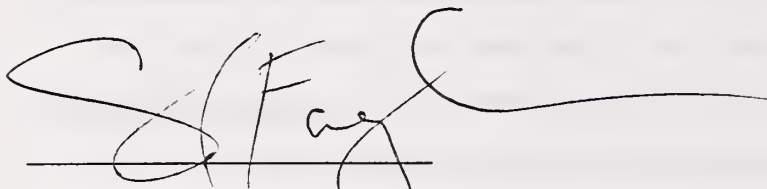
Analysis

As of the date of the motion, Telefficiency and Clubine failed to provide disclosure and to serve and file their pleadings, even after the Board provided an extension of time. The Board is not satisfied that the reasons given in the letter from Brunet dated June 12, 2001, excuse the failure to comply with the Board's Rules of Practice, or allow Telefficiency and Clubine to be relieved from their agreement to provide pleadings and disclosure. Furthermore, while the letter of June 12, 2001 indicates that advice is sought with respect to the Pre-Hearing Conference, the Board cannot act as counsel or advocate to a party.

While there has been default in compliance with the Board's Rules of Practice, at the time that the motion was heard, the Board was not prepared in this case to adopt a procedure analogous to that of the civil court resulting in an admission of the truth of the allegations of fact, as a result of being noted in default due to the failure to file responding materials. However, as set out in the letter dated July 27, 2001, the Board directed the Respondents to provide disclosure to the Commission and Complainant of the information and evidence on which they will rely on to support their case and that failure to do so may result in the Board's refusal to allow the Respondents to refer to or enter the document or physical evidence into evidence at the hearing. In this connection the Respondents were specifically directed to consider the Board's powers as set out in Rule 43 of the Board's Rules of Practice.

If the Complainant or Commission are taken by surprise at the hearing or raise issues of natural justice at that time, the Board will carefully consider the appropriate remedy.

Dated at Toronto this ^{12th} day of September, 2001

A large, stylized handwritten signature in black ink, appearing to read 'S. Faughnan', written over a horizontal line.

Steven Faughnan, Vice-Chair